

STATE OF MICHIGAN
COURT OF APPEALS

RAFAEL ENRIQUEZ and MARY ENRIQUEZ,

Plaintiffs-Appellees,

v

NEW DIMENSION DEVELOPMENT, INC.,

Defendant/Third-Party Plaintiff-
Appellant,

and

TITANUS CEMENT WALL COMPANY,

Third-Party Defendant.¹

UNPUBLISHED

July 17, 2003

No. 237355

Wayne Circuit Court

LC No. 96-632584-CK

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from an amended judgment in favor of plaintiffs. We affirm.

The dispute between plaintiffs and defendant stems from a home defendant contracted to build for plaintiffs. This is the second time this Court has been faced with an appeal arising out of the construction contract between the parties. *See Enriquez v New Dimension Development*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 2001 (Docket No. 216929).

After noticing cracks and water leakage in their basement just six months after taking possession of their home, plaintiffs sued defendant for breach of warranty, negligence, and violations of Michigan's Consumer Protection Act ("MCPA"), MCL 445.901 *et seq.* Following a bench trial, plaintiffs were awarded damages of \$33,085. Particularly, of relevance to the present appeal, plaintiffs were awarded damages for basement wall anchor bolts and fasteners, \$1,675; solid blocking and bridging, \$1,935; and, vertical flange bar supports and grout, \$15,400.

¹ Third-party defendant is not a party to this appeal.

Defendant appealed raising several issues, including whether the trial court erred in awarding damages for alternative methods of repair. The trial court apparently simply adopted the damage report and opinion of plaintiffs' experts that offered two methods of repair to correct the structural defects of the basement. The recommendation was as follows:

- A. The concrete basement walls need to be supported properly at the top.
 - 1. Anchor the floor joists and sill-plate to the top of the wall. (See Sketch No. 2 and 3).
 - 2. Place blocking, same depth as the floor joists, at 4 feet on-center, for three joist spaces at the walls that are parallel to the floor joists. (See Sketch No. 2 and 3).
- B. Then epoxy inject the cracks in-order to keep them waterproof.
- C. Another solution for the basement wall is top place steel posts vertically against the wall at about 5 feet on-center, anchored into concrete below and anchored to the floor framing above. (See Sketch No. 4, 5, and 6).

Options A and C represented alternate methods of repair and plaintiffs' basement's structural defects could be cured with either option. However, in its award, the trial court awarded plaintiffs the cost for both repairs. This Court found that the award for both methods of repair, when only one was necessary, was clearly erroneous and remanded to the trial court with an order to determine which method of repair was appropriate. *Enriquez, supra* at 4.

On remand, the trial court awarded plaintiffs damages for the vertical flange bar method of repair, option C. On this appeal, defendant now argues that the trial court's selection of the vertical flange bar method of repair was not supported by a preponderance of the evidence. We disagree. A trial court's findings of fact are reviewed for clear error. *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002). A factual finding is clearly erroneous if this Court is left with a firm conviction that the trial court made a mistake. *Id.*

In its prior opinion, this Court found that the trial court clearly erred in finding that the house did not have certain necessary fasteners or anchor bolts fastening the superstructure of the house to the foundation. Defendant now argues that because this Court found that the anchor bolts were installed, there is no need to install vertical flange bars. Therefore, defendant argues that there is no support for the trial court's award of damages for option C. Defendant's expert testified that in addition to anchoring the superstructure to the foundation, vertical flange bars are necessary to repair walls that have structural damage. Since defendant's expert opined that plaintiffs' walls did not have structural defects, he stated that vertical flange bars were unnecessary. Plaintiffs' expert, however, testified that the basement walls did, in fact, have structural damage, including extensive cracking, wall deflection, and floating pieces of wall. Therefore, plaintiffs' expert testified that vertical flange bars were necessary to repair plaintiffs' walls. Plaintiffs' expert further testified that the flange bars would alleviate the problems due to cracking and would support the basement walls against various stresses. Given that there was conflicting testimony regarding whether vertical flange bars were necessary to repair the

basement walls, we do not find that the trial court's finding of fact – that the vertical flange bar method of repair was appropriate – is clearly erroneous.²

Next, defendant argues that the trial court failed to follow this Court's prior order on remand. Again, we disagree. Whether the trial court erred by failing to follow an appellate ruling on remand is a question of law reviewed de novo by this Court. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 133-135; 580 NW2d 475 (1998).

"It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v General Motors (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). In its prior opinion in this case, this Court stated: "Including the cost for alternative methods of repair under these circumstances was clearly erroneous. On remand, the trial court shall determine which method of repair is proper and award damages accordingly." *Enriquez, supra* at 4.

Initially, the trial court was under the impression that it was required to decide whether to award damages for interior as opposed to exterior excavation repairs. However, in its prior opinion, this Court upheld the trial court's damages award as it pertained to exterior excavation. *Enriquez, supra* at 4. Attempting to quell the confusion regarding what this Court ordered it to do on remand, the trial court read portions of this Court's opinion into the record. After reading the portion of the opinion outlining the trial court's duties on remand, the following exchange occurred:

[*THE COURT*:] You wanted me to make the determination of whether or not anchoring the floor joists and sill-plate at the top of the walls and placing steel joists vertically against the walls as opposed to sill-plate at the top of the basement walls and placing steel posts vertically. They want me to make that determination?

MR. NELSON: That's right. And I would submit based on the second paragraph on page four, that said that anchoring is not necessary. They said that because of the uncontroverted testimony of John Lamb. When we come down to determine whether vertical flange bars and anchoring as to decide which one, I would submit that none are necessary because the anchoring has already been performed.

THE COURT: Well, they must be internally inconsistent because they told me to choose between the two.

MR. NELSON: To some degree that's true.

THE COURT: Great. You can go back to them. As between the Court, the Court would find that by a preponderance of the evidence, anchoring the floor joists and

² Defendant appears to contend that this Court previously found that the anchor bolts were installed, and thus, the trial court was bound to find that option A was the appropriate method of repair. We reject this contention because in its opinion, this Court specifically left that particular finding to the trial court to make.

sill plate at the top of the basement walls and placing steel posts, et cetera, would be the form taken.

You guys figure out the damages. I didn't understand as completely as I might like the Court of Appeals decision. They'll enlighten me further.

MR. NELSON: All right. So the 15,400 will be awarded. Is that your ruling?

THE COURT: I don't know how much it comes to.

MR. NELSON: That[s] the cost of the vertical flange bars if that method is appropriate that would be the consequences of your decision.

THE COURT: Okay.

Defendant argues that because of the trial court's confusion concerning its duties on remand, the trial court did not follow this Court's remand order. In particular, defendant argues that the trial court did not "determine" which method of repair was appropriate. Despite the trial court's apparent misunderstanding of its duties on remand, we find that the trial court did not act in contravention of this Court's remand order. The remand order simply stated that the trial court was to pick between recommendation A and recommendation C, *Enriquez, supra* at 4; the trial court picked recommendation C. The trial court was not required to hold an evidentiary hearing nor re-open the proofs. In fact, before the hearing, the trial court read the parties' briefs and reexamined the materials from the previous trial. Therefore, we hold that the trial court did not violate this Court's order on remand because it selected one of two appropriate choices for repair.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra